

***NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 30-121-06***  
***AUGUST 28, 1995***

*Administration and Operations  
Agreements with the National Ocean Service*

***MOU B/W NMFS AND NOS CONCERNING PERMITS AND CONSULTATION FOR  
ACTIVITIES THAT AFFECT THE HAWAIIAN ISLANDS HUMPBACK WHALE  
NATIONAL MARINE SANCTUARY***

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**OPR:** F/ (R. Schmitten)  
**Type of Issuance:** Initial

**Certified by:** F/ (R. Schmitten)

***SUMMARY OF REVISIONS:***

Signed \_\_\_\_\_  
 [Approving Authority name] Date \_\_\_\_\_  
 [Approving Authority title]

ATTACHMENT THREE

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE NATIONAL MARINE FISHERIES SERVICE  
AND  
THE NATIONAL OCEAN SERVICE  
CONCERNING PERMITS AND CONSULTATION FOR ACTIVITIES THAT AFFECT THE  
HAWAIIAN ISLANDS HUMPBACK WHALE NATIONAL MARINE SANCTUARY

August 1995

## I. INTRODUCTION

The National Marine Fisheries Service (NMFS) and the National Ocean Service (NOS) have significant roles in the protection and management of humpback whales and their habitat in Hawaii. The roles of NMFS and NOS in the processes of designation, implementation, and operation of National Marine Sanctuaries are provided for in the 1992 and 1993 Memoranda of Understanding concerning the National Marine Sanctuary Program (1992 and 1993 MOUs) entered into by the Assistant Administrators for NMFS and NOS. Inasmuch as NMFS has responsibility for protection and management of the humpback whale under the Marine Mammal Protection Act of 1972 (MMPA), as amended, and the Endangered Species Act of 1973 (ESA), as amended, and the Sanctuaries and Reserves Division (SRD), within the Office of Ocean and Coastal Resource Management (OCRM), administers the Hawaiian Islands Humpback Whale National Marine Sanctuary (HIHWNMS or Sanctuary) under the Hawaiian Islands National Marine Sanctuary Act (HINMSA) and the National Marine Sanctuaries Act (NMSA), close cooperation and coordination are essential in carrying out the respective functions and responsibilities of these two agencies.

Primary responsibility under these laws with respect to permits and consultations have been delegated to or are carried out by the Office of Protected Resources (OPR) within NMFS and by SRD within NOS.

In furtherance of the 1992 MOU, this Agreement sets forth specific procedures by which OPR and SRD will cooperate and coordinate on the issuance of permits and other authorization, and with respect to consultations under the ESA, MMPA, HINMSA, and NMSA, for activities in Hawaii that may affect humpback whales or their Sanctuary habitat.

Pursuant to section II of this MOU, OPR will cooperate and coordinate with SRD concerning the issuance of permits and other authorizations under the ESA and MMPA for activities in Hawaii that may affect humpback whales or their Sanctuary habitat. OPR issues permits and authorizations under the ESA and MMPA for activities affecting the humpback whale (e.g., research). The Sanctuary regulations do not contain provisions for the issuance of Sanctuary permits or other authorizations at this time. SRD will cooperate and coordinate with OPR if permit regulations or procedures for other authorizations are developed in the future.

Pursuant to section III of this MOU, OPR and SRD also will cooperate and coordinate with respect to consultations required under section 304(d) of the NMSA and section 7 of the ESA for Federal activities that may affect humpback whales or their Sanctuary habitat.

## II. PERMITS

A. "Application for permit" as used in this agreement includes an application for a permit or request for an authorization under the ESA or MMPA, including an application or request for an initial permit or authorization, application or request for a permit or authorization renewal, and an application or request for a significant permit or authorization modification. A significant permit or authorization modification would alter the number, the species, or the type of takings that would be authorized and/or for which publication of notice in the Federal Register would be required.

B. Consistent with Section A. 4) of the 1992 MOU, SRD will do the following:

1. SRD will review applications for permits under the MMPA and ESA and provide comments to OPR during the public comment period, including comments concerning proposed permit conditions and other recommendations;

2. In instances where issuance of an MMPA or ESA permit may be in conflict with NMSA or HIHWNMS requirements, regulations or policies issued or established under those Acts, SRD will provide early, informal notification to OPR so that recommendations, including recommendations for alternative methods, areas, or other options and for mitigation measures may be considered. If appropriate, OPR will communicate those recommendations to the permit applicant.

C. Consistent with Sections B. 4) of the 1992 MOU, OPR will do the following:

1. OPR will notify SRD when an application for a permit has been received for proposed activities that may affect humpback whales or their Sanctuary habitat in Hawaii;

2. OPR will provide SRD with a copy of each completed application for a permit for activities that may affect humpback whales or their Sanctuary habitat; OPR will provide this copy to SRD at the same time or before any notice is filed with the Office of the Federal Register concerning the application for a permit;

3. OPR will issue, condition, or deny issuance of, as appropriate, permits or authorizations under the ESA or MMPA for activities that may affect humpback whales or their Sanctuary habitat in Hawaii in coordination with SRD comments, including comments concerning proposed conditions and other recommendations;

4. OPR will provide to SRD, as appropriate, written responses to comments, proposed conditions and other recommendations which were not incorporated or addressed in permits or authorizations issued under the ESA or MMPA for activities that may affect humpback whales or their Sanctuary habitat in Hawaii.

D. Should HIIHWNMS regulations or procedures for the issuance of Sanctuary permits or other authorizations be developed in the future, this MOU may be modified to include procedures by which SRD will cooperate and coordinate with OPR in the review and issuance of such permits and authorizations.

### III. CONSULTATION

A. Federal agencies are subject to the consultation requirements of section 7 of the ESA, and implementing regulations at 50 C.F.R. Part 402, for Federal actions that may affect humpback whales, and section 304(d) of the NMSA, HIIHWNMS regulations at 15 C.F.R. § 945.8, for Federal agency actions internal or external to the Sanctuary (including private activities authorized by licenses, leases, or permits) that are likely to destroy, cause the loss of, or injure any Sanctuary resource. Humpback whales and their Sanctuary habitat are Sanctuary resources.

B. While recognizing that the consultation requirements of the two statutes differ, OPR and SRD agree to cooperate and coordinate, to the maximum extent possible, with respect to the ESA and NMSA consultation procedures for activities pertaining to the humpback whales and their Sanctuary habitat in Hawaii.

1. If an agency attempts to initiate consultation under section 304(d) of the NMSA with respect to proposed activities that are likely to destroy, cause the loss of, or injure a humpback whale or its Sanctuary habitat in Hawaii, SRD will notify OPR and encourage the agency to initiate section 7 consultation on the proposed activity. SRD will also inform the agency that the NOAA point of contact for such consultations is the NMFS Southwest Region, Pacific Area Office.

2. When consultation under section 7 of the ESA is initiated for activities that may affect humpback whales or their Sanctuary habitat in Hawaii, OPR will notify SRD so that SRD may be kept apprised of proposed relevant Federal agency actions. OPR will coordinate with SRD to ensure any Sanctuary concerns are addressed during the section 7 consultation.

3. If OPR or the relevant Federal agency determines that the proposed action may adversely affect humpback whales (directly or indirectly), OPR will forward copies of all information on the proposed action to SRD for review and consultation under section 304(d) of the NMSA. OPR and SRD will coordinate and cooperate throughout the consultation process.

4. Upon completion of coordinated consultation, NOAA will provide the action agency with a coordinated response which satisfies both ESA and NMSA requirements which will include any appropriate recommendation(s), mitigation measure(s) and a biological opinion.

5. The NMFS Southwest Region, Pacific Area Office, will serve as the NOAA contact point for agencies undergoing section 304(d) consultation for activities that are likely to destroy, cause the loss of, or injure a humpback whale or its Sanctuary habitat in Hawaii.

#### IV. POINTS OF CONTACT

Within thirty (30) days from the effective date of this MOU, the Director of OPR and Chief of SRD shall identify in writing the points of contact within their respective offices for coordinated permit reviews and consultations consistent with this agreement.

#### V. PERIOD

This agreement will become effective on the date of the last signature of the approving official of either party and will continue in force for ten years.

#### VI. MODIFICATION/CANCELLATION PROVISION

This MOU may be amended at any time by mutual written consent of the parties. This MOU will be reviewed periodically, but not less than annually. It may be canceled by either party with 60 days written notice.


#### VII. OTHER PROVISIONS

Nothing herein is intended to conflict with current SRD or OPR directives or with any Federal or state laws, regulations, policies or directives. If the terms of this agreement are inconsistent with existing SRD or OPR directives, then these portions of this agreement which are determined to be inconsistent shall be invalid; but the remaining terms and conditions not affected by the inconsistency shall remain in full force and effect.


At the first opportunity for review of the agreement, all necessary changes will be accomplished by either an amendment to this agreement or by entering into a new agreement, whichever is deemed expedient to the interest of both parties.

Should disagreement arise on the interpretation or implementation of the provisions of this agreement, or amendments and/or revisions thereto, that cannot be resolved at the operating level, the matter shall be forwarded to respective higher officials for appropriate resolution.

VIII. APPROVED

  
Rolland A. Schmitt  
Assistant Administrator for Fisheries

Date 8/28/95

  
W. Stanley Wilson  
Assistant Administrator for  
Ocean Services and Coastal  
Zone Management

Date 7/28/95